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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91202367
Party	Defendant Acronis International GmbH
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Ivan Permyakov Opposer v. Acronis Inc. Applicant	Opposition No. 91202367

MOTION FOR SUMMARY JUDGMENT

NOW COMES Applicant Acronis, Inc., by and through its attorneys, and submits this Motion for Summary Judgment. As supported by Applicant's memorandum in support of this motion, Applicant hereby seeks summary judgment as a matter of law regarding the following issues as to which there is no genuine dispute of material facts:

1. Opposer lacks standing to oppose the registration of Applicant's trademark;
2. Opposer cannot possibly show a likelihood of confusion as a matter of law between his mark and Applicant's mark.

Accordingly, Applicant Acronis, Inc. respectfully requests that the Board grant its motion for summary judgment and dismiss Opposer's opposition in its entirety.

Dated: October 25, 2012

By: /s/

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MEMORANDUM IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT

Applicant Acronis Inc. and its successor-in-interest Acronis International GmbH, by and through its attorneys, hereby submits its memorandum in support of its Motion for Summary Judgment and requests that, in light of the below arguments and evidence, the Board should find there is no genuine issue of material facts and as a matter of law Opposer Ivan Permyakov lacks standing to bring the opposition and, even if he had standing, Opposer cannot show a likelihood of confusion.

I. Facts

Applicant Acronis Inc. and its successor-in-interest Acronis International GmbH (hereinafter "Applicant" or "Acronis") is a software product and service provider, specializing in effective backup and restoration of computer data and programs. Exh. A at ¶ 3 (Declaration of Dmitri Joukovski). Acronis is a recognized leader in this field, with over 175,000 customers in more than 90 countries. *Id.* at ¶ 4. On May 24, 2011, Acronis filed an application with the United States Patent and Trademark Office to register its VMPROTECT trademark on an intent-to-use basis in International Class 009: "Computer software for backup and recovery of virtual machines; computer software for database imaging, virtual machine imaging, and disk imaging; computer software for snapshot generation, backup, and disaster recovery; computer software for

virtual machine backup and recovery, including migration from a physical machine to a virtual machine" (the "Acronis Mark"). *See* Exh. B (VMPROTECT Trademark/Service Mark Application, Principal Register).

On October 4, 2011, the Acronis Mark registration was published for opposition. *See* Exh. C (Notice of Publication). On October 31, 2011, Opposer Ivan Permyakov, an individual, was granted a 30 day extension to file his opposition to the registration of the Acronis Mark. *See* Exh. D (Extension of Time to Oppose is Granted). Opposer filed his opposition on November 1, 2011 and supplemented the Notice of Opposition on December 11, 2011. *See* Exh. E (Notice of Opposition and Supplement).

Opposer brings his opposition on grounds that there is a likelihood of confusion between the product sold by the Applicant under the Acronis Mark (hereinafter, "Acronis' Product") and a product (hereinafter "IYP IP Company Product") sold under the VMPROTECT mark (hereinafter, the "IYP IP Company Mark") not by Opposer himself as an individual, but instead by the company "Ivan Yurevich Permaykov, IP". *See* Exh. E; Exh. F at 9:3-11 (Deposition Transcript of Ivan Permyakov):

> Q: And the name of the company is Ivan Yurevich Permyakov, IP?
> A: Yes, it is.
> Q: And since 2004, you've been doing business under that name, Ivan Yurevich Permyakov, IP?
> A: Yes.

In addition, as admitted by Opposer, the two companies' products are different, serve different functions, and are sold to different markets. Acronis' Product is software which enables users to backup and recover data. Exh. A at ¶ 5. The IYP IP Company Product, on the other hand, is designed to protect computer code including from cracking and analysis. *See* Exh. E (the IYP IP Company Product is described as "[c]omputer software for protecting applications, libraries and drivers; computer software for virtualizing the code to prevent its cracking and

analysis; computer software to add a serial number verification to other applications."); Exh. G (IYP IP Company Website) (accessed on October 19, 2012) ("VMProtect protects code by executing it on a virtual machine with non-standard architecture that makes it extremely difficult to analyze and crack the software.").

II. Argument

A. Standard of Review

As the Federal Circuit Court of Appeals held in *Brand Mgmt. v. Menard, Inc.*, 1998 U.S. App. LEXIS 493, 5-6 (Fed. Cir. Jan. 14, 1998):

> Summary judgment is proper where the movant establishes that there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if there is a dispute of fact, the disputed fact is material to the outcome of the case, and the dispute is genuine, that is, a reasonable jury could return a verdict for either party. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party has the burden of proving that summary judgment is proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). When considering a motion for summary judgment, a court should construe all evidence in favor of the non-moving party. *Anderson*, 477 U.S. at 247. However, if evidence submitted by the non-moving party is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-50.

Furthermore, when evaluating the opposing party's arguments:

> The court may not simply accept a party's statement that a fact is challenged. *Union Carbide Corp. v. American Can Co.*, 724 F.2d at 1571, 220 U.S.P.Q. at 588 [Fed. Cir. 1984]. The party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient.

Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd., 731 F.2d 831, 836, 221 U.S.P.Q. (BNA) 561, 564 (Fed. Cir. 1984).

B. Because Opposer Permyakov Cannot Show That He Has Standing, His Opposition Must Be Dismissed

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